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No. 02-

IN THE

Supreme Court of the United States

FORD MARRIN ESPOSITO WITMEYER & GLESER, L.L.P.,

Petitioner,

v.

ELLEN FITZGERALD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Certiorari should be granted here to resolve the exceptionally important interrelationship between sexual harassment law and the First Amendment.

The First Amendment states in no uncertain terms that "Congress shall make no law abridging the freedom of speech." Yet, a female former employee of a law firm, employed there as an experienced litigator, sued her former employer asserting that she suffered hostile environment sex harassment because she heard speech uttered in the workplace the content of which she found offensive, but about which she did not complain. The district court, in considering the employer's post-trial motion for judgment as a matter of law, observed that her claim ran afoul of the First Amendment; it then granted the motion because the former employee failed to prove conduct sufficient to comprise a hostile environment. Yet, in reinstating a hostile environment sex harassment jury verdict, the United States Court of Appeals for the Second Circuit allowed petitioner-employer to be sanctioned for pure speech uttered in the workplace. Title VII does not escape First Amendment scrutiny and cannot act as a *per se* deprivation of the First Amendment's protection of pure speech merely because that speech is uttered in the workplace and offends an employee. Laws cannot oblige employers to censor employee speech based upon its content. Juries cannot be allowed to impose liability based upon their personal views of what topics and words are offensive.

The questions presented are: (i) whether an employer can be held liable under Title VII for an employee's hostile-environment claim when the claim involves pure speech protected under the First Amendment — conversations

among adults in privately-owned workplace involving topics supposedly offensive to another employee who heard the remarks; (ii) whether such pure speech can be part of and rise to the severe and pervasive level of ridicule, intimidation and humiliation required to state a hostile environment cause of action; and (iii) whether the employee's claim for a hostile environment based on such speech is barred where, as here, she did not complain about it to the petitioner employer until several months after she voluntarily left petitioner's employ — and did so via an EEOC charge.

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Petitioner Ford Marrin Esposito Witmeyer & Gleser, L.L.P. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Griesa, D.J.,) denying petitioner's motion for summary judgment (Appendix C) is published at 37 F. Supp.2d 621. The district court's subsequent opinion granting petitioner's post-trial motion for judgment as a matter of law (Appendix B) is published at 153 F. Supp.2d 219. The court of appeals' opinion (per Leval, JJ., joined by Calabresi, JJ. and Stein, DJ.) reversing the judgment (Appendix A) is not published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on February 27th, 2002, and denied rehearing *en banc* on April 29th, 2002. (Appendix D) Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254. This petition is filed within ninety days after the order denying rehearing *en banc*.

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

The provision of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), relevant to this petition states that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

The First Amendment to the Constitution of the United States states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ."

STATEMENT OF THE CASE

Respondent, at the time a thirty year old litigation lawyer, sued petitioner, her former employer, for hostile environment-based sex harassment based on ***words*** uttered in conversations in petitioner's workplace at various times during the fourteen months of her employment from November 23, 1993 to February 2, 1995. During her employment, respondent never advised any of the speakers that she found their speech harassing and never made a complaint, either formal or informal, to petitioner employer. The initial "notice" that petitioner received of respondent's grievance that it should have censored workplace speech that she found offensive was an EEOC charge filed on September 11, 1995, more than seven months after she had voluntarily left petitioner's employ.

Unlike most hostile environment sex harassment cases, respondent was never touched much less touched offensively. To the contrary, she admitted she engaged in mutually consensual kissing after working hours with one of the junior male associates in his apartment, even though she now accused him of continuously harassing her with offensive speech both before and after their amorous personal interlude. Nor did the male associates' conversations involve any sexual propositions, advances, or threats directed at respondent as a condition to her work, or any misogynist epithets or workplace sabotage designed to intimidate and disadvantage her as a woman in her job as a lawyer. No one displayed pornography in the workplace nor posted lewd or graphic drawings depicting respondent.

Instead, respondent's claim rested predominantly on her listening to conversations among a few of her male co-workers, other associate attorneys, and two or three insults she said were uttered to her. The male associates:

> talked about "sex lives" and . . . jokes about sex and women. At least two of them were not married and there was talk about their sexual prowess and whether they were "getting any." They speculated about the sex lives of certain partners, including speculation about possible homosexual activity with associates on business trips. There was joking about masturbation in slang terms. Slang words for the male sex organ were part of the conversation. The word "fuck" was uttered for instance, when a copy machine malfunctioned.

(Appendix B, at 11a). The conversations though were:

> not directed at [respondent] or her friends. Nor was it about any of them. It did not disparage them or contain anything insulting to them personally, nor was there any joking or bantering about anyone having sexual activity with [respondent] or her friends.

(Appendix B, at 36a).

While these conversations represented the overwhelming bulk of respondent's case, as she claimed that they happened all the time, the Second Circuit attempted no analysis of the speech involved or the circumstances surrounding the speech, including the relationship between respondent and the speakers. Undisputed objective evidence and respondent's

own admissions established that she had freely socialized with her purported harassers on a litany of occasions.

The Second Circuit simply swept all of this speech under the rug without any consideration of whether the First Amendment protected it or if it rose to the level of intimidation and ridicule that this Court has held is required to sustain a hostile environment cause of action.

Bizarrely, the Second Circuit's ruling imposes a financial penalty on partners of the petitioner firm who were the targets of the personal insults which respondent overheard. For example, one of the explicit bases upon which the Second Circuit reversed the judgment was the fact that petitioner heard insults privately uttered about a female partner that she slept her way to the top "by rendering sexual favors." (Appendix A, at 5a). To add insult to injury, that female partner now has to pay a share of the $80,000 in damages and $800,000 in attorneys fees that respondent stands to recover because she heard an insult uttered about the partner and chose not to tell the partner of the insult. According to the strange reasoning of the Second Circuit, these co-employee insults directed against a partner meant that the partnership harassed the respondent.

Similarly, in addressing a handful of mildly suggestive remarks supposedly directed at her by one of the male associates, the court of appeals ignored respondent's own witnesses' descriptions of those comments as having been made in a humorous or flirtatious manner and the undisputed record showing that she engaged in regular social interactions with that particular male associate and asked him for personal favors. Instead, the court of appeals took a single remark said to have been made by the male co-worker ("you know

who to come to and I'll take care of you") completely out of its record context in its decision to refute the district court's correct assessment of the non-threatening, non-intimidating relationship respondent had with that male co-worker. The court of appeals, for example, ignored the undisputed fact that, shortly *after* the remark was made, respondent sought out the male co-worker's help in breaking her apartment lease and thereafter sought his assistance on other occasions. *Compare* court of appeals' recitation of words from e-mail (Appendix A, at 4a) *with* district court's discussion of surrounding circumstances. (Appendix B, at 43a-44a)

The remaining parts of respondent's case included accusations that a partner uttered remarks out of her presence but on social topics that she considered offensive to women regarding a unanimous Pennsylvania Supreme Court decision on the evidentiary standard for rape,[1] and the *Menendez brothers'* trial and the victim defense, and on another occasion was bemused when told of California allowing continuing legal education credit for a course on gender sensitivity. The balance was that a partner insulted her on two occasions by referring to her as "dyke" or "butch,"[2] on one occasion listened to respondent call herself a "butch" and on one

1. *Commonwealth v. Berkowitz*, 537 Pa. 143, 641 A.2d 1161 (Pa. 1994).

2. Name calling does not comprise conduct unprotected by the First Amendment. *See, e.g., Ward v. Zelikovsky*, 643 A.2d 972 (N.J. 1994) (publicly calling a person a "bitch" and a "Jew hater" is not actionable); *Donovan v. Fumara*, 442 S.E.2d 572 (N.C. App. 1994) (name calling of "gay" and "bisexual" not unprotected slander); *Bekele v. Ryals*, 339 S.E.2d 655 (Ga. App. 1986) (name calling with racial epithets not actionable).

occasion of making a double-entendre joke about another partner. The district court, in a meticulously crafted, lengthy decision, found that these utterances, when considered in the totality of the circumstances, did not constitute a hostile environment based on gender and granted petitioner judgment as a matter of law on petitioner's post-trial motion to vacate a jury verdict in favor of respondent.

The district court explained:

> I do see a First Amendment problem and it is intimately related to the kind of conduct which was in evidence here. . . . It seems to me that it is different from the type of conduct which occurs in cases that I have read and been referred to. I have a very serious question about whether any law, any statute can act in such a way as to make it unlawful to engage in this kind of speech which is in evidence here.
>
> * * *
>
> The First Amendment recognizes that you really — not only should you not restrict speech, but you really can't. You can't govern people's thoughts. I have my standards. I can't tell someone what their standards should be. I can't tell them what their speech should be.
>
> * * *
>
> Certainly they [the defendant-petitioner] have a sufficient record on Plaintiff as a First Amendment defense here, and I think it has to be dealt with as a matter of law and it is properly raised on a motion for judgment as a matter of law.

* * *

> And I am just really bothered by the prospect of a decision and a rule of law which would go around and tell every office, you can't say these things.

Yet, the court of appeals ignored the First Amendment and reversed by summary order, concluding that the various conversational speech, social and political speech, mild flirting and three personal insults "represented successful efforts to belittle and humiliate [respondent] by reason of her gender" and rejecting the petitioner's First Amendment arguments. (Appendix A, at 5a)

The court of appeals' ruling requires this Court's review because finding a hostile environment based primarily on conversational speech violates the First Amendment. The court of appeals' ruling also finds a hostile environment on facts that fall well short of the standards articulated by this Court in explaining that Title VII does not create a "general civility code." Finally, this Court should also review the court of appeals' reversal of judgment in favor of petitioner, as the principles regarding the silent employee articulated by this Court in its recent decision in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (Jun. 10, 2002), require judgment in favor of petitioner based on respondent's failure to complain or give petitioner notice about the supposedly harassing speech until more than seven months after she had voluntarily left petitioner's employ.

First, the First Amendment cannot simply be ignored when dealing with sexual harassment cases based on conversational speech, and the court of appeals' refusal to even acknowledge this fundamental issue is disturbing.

The Constitution dictates that the appellate court must "make an independent examination of the whole record" and review the speech at issue *de novo* to determine if any of the speech is protected. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 & 514 (1984) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 284 (1964)). If that *de novo* review discloses that the jury might have taken protected speech into account in the determination of liability, the court must reject any adverse ruling based even in part on that speech. This Court must ensure that these fundamental First Amendment rules are applied in hostile environment cases, which the Second Circuit utterly failed to do in this case.

Second, certiorari is warranted because the court of appeals failed to follow this Court's standards for finding a hostile work environment based on sex. As this Court has explained, misplaced humor and flirting do not create an abusive and hostile environment. The district court properly granted petitioner's motion for judgment as a matter of law by adhering to this Court's mandate to analyze the "totality of the circumstances" and to "filter out" cases that are not "severe or pervasive" enough to create a hostile environment. The court of appeals' terse summary order reversing the district court's meticulous opinion completely ignored this Court's specific mandates that: (i) "Title VII is not a 'general civility code'";[3] (ii) that "[o]rdinary socializing in the workplace [such as] intersexual flirtation" does ***not*** constitute sexual harassment;[4] (iii) that workplace speech is ***not*** "automatically discrimination because of sex merely because

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3. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998).

4. *Id.*

the words used have sexual content or connotations";[5] and (iv) that "[t]he ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing" do ***not*** create a hostile environment.[6] The facts of this case fit squarely into what this Court has declared does not constitute a hostile environment, and the Second Circuit cannot be permitted to run rough-shod over the standards set down by this Court. The Second Circuit's approach to hostile environment claims, as manifested by its ruling in this case, simply opens the floodgates and makes it open season on employers.

Third, this Court should grant certiorari since the principles articulated in this Court's recent decision in *National Railroad Passenger Corp.*, *supra*, require that the silent employee, who, as here, waits until seven months after leaving and more than one year after some of the purportedly harassing words were uttered to put the employer on notice that she felt harassed, cannot maintain a hostile environment claim. As the district court cogently recognized, respondent's case was flawed by her failure to complain:

> [t]hat is the problem with this case; the one person who had had it all put together, according to her testimony, is the plaintiff, and she never told them until she sues and it is too late for them to do anything about it.

The silent employee frustrates the remedial purpose of the antidiscrimination laws, as well as depriving employers

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5. *Id.* at 80.

6. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

of their ability to defend themselves. This is especially so in a speech-only hostile environment action that depends so heavily on the exact words and context of the purportedly offending speech, all of which quickly and easily passes from memory. The silent employee further frustrates the avenue provided to employers to avoid liability by promptly correcting workplace problems. The silent employee should not be rewarded for her silence by being able to maintain a hostile environment claim.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE EXCEPTIONALLY IMPORTANT CONFLICT BETWEEN SEX HARASSMENT LAW AND THE FIRST AMENDMENT WHERE A HOSTILE ENVIRONMENT CAUSE OF ACTION IS BASED ON CONVERSATIONAL SPEECH

A. *A Speech-Based Hostile Environment Claim Intrudes On First Amendment Protections*

A hostile environment cause of action based on speech undoubtedly requires strict First Amendment scrutiny and protection. As Justice Thomas opined in dissenting from the denial of certiorari in *Avis Rent A Car, Inc. v. Aguilar*, 529 U.S. 1138, (Thomas, J. dissenting to denial of certiorari) (2000), which involved an injunction ordering an employer to forbid one of its employees for using racially derogatory epithets directed at Hispanic co-workers:

> I would grant certiorari to address the troubling First Amendment issues raised by this injunction. Attaching liability to the utterance of words in the

> workplace is likely invalid for the simple reason that this speech is fully protected speech. . . . To uphold the application of a content-based antidiscrimination law such as FEHA to pure speech in the workplace, then, we would have to substantially modify our First Amendment jurisprudence.

529 U.S. at 2031. As the reporters and federal court dockets are filled with hostile environment cases based on pure speech in the form of conversational workplace speech, it is critical that this Court resolve the issue of First Amendment scrutiny of hostile environment claims and ensure the protection of the speech on which such claims are based. As the Fifth Circuit has acknowledged:

> [w]here pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.

DeAngelis v. El Paso Municipal Police Officers Ass'n, 51 F.3d 591, 596-97 (5th Cir. 1995), *cert. denied*, 516 U.S. 974.

Respondent's hostile work environment claim rested primarily on her objection to the *content* of conversational speech of male co-workers. This cannot be, as the First Amendment has never been interpreted so restrictively as to deprive workplace speech of First Amendment protection or to afford First Amendment protection only to debate in the

marketplace of ideas on matters of public concern. Instead, if the employment discrimination laws impose content-based restrictions on workplace speech in conflict with the First Amendment's protection of such speech, those laws must yield to the First Amendment. "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, ***the general rule is that the right of expression prevails***, even where no less restrictive alternative exists." *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 812 (2000) (emphasis added).

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys," *Rosenberger v. University of Virginia*, 515 U.S. 819, 828 (1995), and "[t]he First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed," *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). Thus, for a hostile environment claim to survive First Amendment scrutiny, it must consist of the conversational expression of words that threaten or intimidate the listener, otherwise, the employment discrimination laws improperly delegate "broad powers to courts to determine matters of taste and humor." Browne, *Title VII As Censorship*, 52 OHIO STATE L.J. 481, 483 (1991). Even worse, "[holding] employers liable for the offensive speech of their employees exacerbates that chilling effect, because fear of litigation and liability creates a powerful incentive for employers . . . to censor the speech of their employees." *Id.* Recognizing that the First Amendment precludes such restraints "is to accept the fundamental constitutional truth that the government may not establish a fundamental moral truth through the suppression of expression." *Id.* at 550.

No constitutional justification exists for the broad suppression of *content-based* speech by the creation of a words-only hostile environment cause of action under the antidiscrimination laws. If applied, as here, to pure speech, the laws impermissibly restrict speech based on *content* and *viewpoint* and cannot be justified as valid time, place and manner restrictions. "Even if these words do constitute so-called 'low-value speech,' the content-based nature [of an antidiscrimination law] renders it invalid under our current jurisprudence." *Avis Rent A Car*, 529 U.S. at 1138.

This Court should grant certiorari here to ensure that First Amendment scrutiny and protection results in speech-based hostile environment cases.

B. *Employers Cannot Be Sanctioned Based On Protected Speech*

The court of appeals' tacit acceptance of the proposition that Title VII sanctions for workplace speech are immune from First Amendment scrutiny was wrong. Speech does not lose its First Amendment protection merely because it is uttered in the workplace. Plainly, governments cannot impose laws requiring private businesses to take actions which if taken by the government directly would be unconstitutional,[7]

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7. *E.g.*, *Patterson v. City of Greenville*, 373 U.S. 244, 247-48 (1963) (even though pre-1964, private businesses could lawfully maintain segregated places of business, law requiring private company to segregate would be unconstitutional because government could not discriminate); *Traux v. Raich*, 239 U.S. 33, 35 (1915) (declaring unconstitutional private employer's firing of "at will" employee so as to comply with law that required private employers to maintain workforce predominantly of citizens); *see also Wooley v. Maynard*, 430 U.S. 705 (1977) (state cannot require automobile owner to display motto "live free or die" on private vehicle).

and cannot allow private litigants to recover damages from one another for speech protected by the First Amendment.[8]

These rules do not change when the First Amendment is confronted by the employment discrimination laws. So, those laws cannot require an employer to forbid employees from having personal discussions among themselves about "adult" topics because doing so amounts to constitutionally forbidden, content-based suppression of speech. *See Johnson v. County of Los Angeles*, 865 F. Supp. 1430, 1436-41 (C.D. Cal. 1994). Nor can the anti-discrimination laws preclude lawyers from using confrontational techniques or outrageous examples or discussing controversial topics in discussions with or among sophisticated workers (lawyers with postgraduate degrees). *See Silva v. UNH*, 888 F.Supp. 293, 313-14 (D.N.H. 1994).

Thus, this Court should grant certiorari to ensure that the First Amendment protection of workplace speech is not eviscerated.

C. *A Hostile Environment Claim Must Exclude Any Protected Speech*

As this Court has held, whenever the "possibility" exists that liability might be based even in part upon protected speech,[9] judgment cannot be entered without further

8. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (First Amendment scrutiny for private, civil libel restrictions); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (likewise for civil suits for intentional infliction of emotional distress).

9. A plaintiff *cannot* sue based on a *combination* of protected speech and unprotected behavior, but only on behavior unprotected by the First Amendment. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 915 (1982).

proceedings conducted without any consideration of the protected speech. *Street v. New York*, 394 U.S. 576, 590 (1969).[10] Respondent plainly included protected speech in her case, *e.g.*, the pure conversational speech of her co-workers and the partner's opinions on societal issues with which she disagreed.

Indeed, with respect to the latter, the First Amendment steadfastly protects "uninhibited," "robust," "wide-open," "vehement," "caustic," and "unpleasantly sharp attacks" by persons speaking views on such subjects. *Sullivan*, 376 U.S. at 270-71. No law, much less anti-discrimination law, can forbid intellectual discussion of "adult" or "political" topics in a law firm. This is a most closely protected area of free speech, *i.e.*, the exchange of ideas. Sex harassment law cannot trump the First Amendment and sanction the speaker because of his viewpoint, merely because the speech is uttered in a workplace and disliked by one or more employees. "Viewpoint discrimination is . . . an egregious form of content discrimination." *Rosenberger*, 515 U S. at 829.

This Court should grant certiorari since the judgment against petitioner was based on protected speech in violation of the First Amendment.

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10. *See also Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977) (where factfinder's decision was possibly motivated by taking offense to content of protected speech, constitutional error occurs); *Village of Arlington Heights v. Metropolitan Housing Devel. Corp.*, 429 U.S. 252, 270 n.21 (1976) (same).

D. *The Speech-Based Hostile Environment Claim Is Vague and Overbroad*

Finally, the application of sex harassment law to conversational workplace speech violates the First Amendment because those laws are too vague and overbroad to subject petitioner to liability for failing to censor co-worker speech.[11]

As one court has observed, determining whether a work environment is sexually hostile is like "'trying to nail a jellyfish to the wall'" because the law is "enervated by vague, almost circular standards" that require judges to "compare the crudity and 'lewdity' found in one case with that deemed sufficient to survive a Rule 50 or 56 motion in another." *Breda v. Wolf Camera, Inc.*, 148 F. Supp.2d 1371, 1376-77 (S.D. Ga. 2001) (granting employer's motion for summary judgment because "merely inserting every last rude or sexualized comment/gesture/joke into a lengthy list . . . does not a Title VII claim make.") (internal citation omitted).

The present cause of action for hostile environment sex harassment based on speech gives the employer no clear guidance as to what speech it must censor to avoid monetary liability. Thus, the overbroad law unconstitutionally imposed on petitioner (and will impose on all employers), a need to

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11. A law restricting speech is unconstitutionally overbroad when it "silences *some* speakers whose messages would be entitled to constitutional protection." *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (emphasis added); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973). A law is vague when it "fails to establish standards . . . that are sufficient to guard against the arbitrary deprivation of liberty." *Chicago v. Morales*, 527 U.S. 41, 42 (1999); *see Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

chill protected expression because the employer cannot determine in advance what conversational speech will be considered "severe or pervasive" in a particular case, or what an employee might deem offensive. The overbreadth of the law means the employer must restrict all speech that someone *might* deem offensive in order to avoid liability.

As one respected commentator aptly described:

> [t]wo features of harassment law coalesce to create a substantial chilling effect on expression. The first is the vagueness of the standard; because it is unclear what is permitted and what is not, the law pressures speakers to steer well clear of the line between legal and illegal speech. The second is the system of vicarious employer liability: employers are charged by law with regulating the speech of their employees, and the incentives operating on the employer virtually compel it to overregulate.

Browne, *Title VII as Censorship*, 52 OHIO ST. L.J., 481 (1992).

This Court should grant certiorari to provide the necessary standards for a speech-based hostile environment cause of action that is neither overboard nor vague.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT REGARDING THE TYPE OF CONDUCT THAT CONSTITUTES "SEVERE OR PERVASIVE" HARASSMENT

The district court correctly granted judgment as a matter of law dismissing respondent's hostile work environment claim because Petitioner's workplace was not "permeated with 'discriminatory intimidation, ridicule, and insult'" that was "'sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment.'" *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 & 67 (1986)). Giving respondent all reasonable inferences and looking "at all the circumstances," *Harris*, 510 U.S. at 23, which involves "a constellation of surrounding circumstances, expectations, and relationships," not just "a simple recitation of the words used,"[12] the district court held that Petitioner's workplace fit squarely within the environment that this Court declared is ***not*** a hostile environment. The district court correctly concluded that:

> Given the entire picture of FitzGerald's treatment by Tricarico, Adrian and Beke and the one or two others, there is no basis for saying that these associates were severely hostile or abusive to her or that they inflicted upon her a severely or pervasive abusive working environment.
>
> * * *
>
> The court believes that the kind of teasing and joking conduct in question here is what the

12. *Oncale*, 523 U.S. at 81-82; *see also Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001) ("Workplace conduct is not measured in isolation.").

> Supreme Court has specifically excluded from being grounds for Title VII liability. Moreover, when all the circumstances are taken into account, the conduct of Adrian, joined by a few others, was not hostile or abusive toward FitzGerald and did not, when the whole picture of the friendship between Adrian and FitzGerald is considered, inflict upon FitzGerald an abusive working environment.

(Appendix B, at 38a, 41a-42a).

Petitioner's workplace did not transcend what this Court described as the "ordinary tribulations of the workplace" and did not cross the line into actionable sexual harassment including "sexual assaults; offensive physical contact, for which there is no consent express or implied, whether amorous or hostile; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; [and] pornographic pictures." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995); *accord Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 571 (2d Cir. 2000) ("[T]he physically threatening nature of [the co-worker's] conduct, which repeatedly ended with him backing [plaintiff] into the wall until she had to 'cut the conversation short' in order to extricate herself, brings this case over the line separating merely offensive or boorish conduct from actionable sexual harassment."). The court of appeals completely ignored the mandates of this Court that the district courts "filter out" such hostile environment claims. This Court should grant certiorari to ensure that the Second Circuit is not permitted to deprive the district courts of this necessary "filtering out" process which has been mandated by this Court.

III. CERTIORARI SHOULD BE GRANTED BECAUSE RESPONDENT FORFEITED HER CLAIM BY FAILING TO COMPLAIN

During the course of her employment, even though respondent employee asserts that she had been harassed as early as the first month of her tenure, respondent ***never*** complained to the petitioner employer (or to her co-workers who used "offensive" language) or otherwise did anything to put the petitioner employer on notice that she believed she had been subjected to a hostile environment. She made her first complaint — an EEOC charge — more than seven months ***after*** she voluntarily left the petitioner firm to accept a position with another firm.

The principles regarding such a "silent employee" articuated by this Court in its recent opinion in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (Jun. 10, 2002), dictate that a speech-based hostile environment claim brought by a voluntarily departed employee who first gives notice to her employer of harassment more than seven months after she leaves that employ must be dismissed. This Court should grant certiorari to amplify its "silent employee" principles as applied to this scenario.

In *National Railroad Passenger Corp.*, this Court addressed the situation where an employee brings a hostile environment claim based on acts which are spread over time but for which the employee makes a claim only at the end of his employment. To counterbalance this Court's holding that such claims should include incidents which took place prior to the 180-day or 300-day filing period for Title VII claims, this Court recognized that:

> [e]mployers have recourse when a plaintiff unreasonably delays filing a charge. . . . [The Title VII filing period] is a requirement subject to waiver [and] estoppel. . . . These equitable doctrines allow us to honor Title VII's remedial purpose "without negating the particular purpose of the filing requirement, ***to give prompt notice to the employer***." [emphasis added]

122 S. Ct. at 2076, 2002 WL 1270268, at *12 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982)). This Court continued to explain that where an employee has delayed in providing notice of the purported harassment to his or her employer, "'a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense,'" and, thus, the employee might not be entitled to relief. *Id.* (quoting *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 373 (1977) and citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975)). This Court accordingly held that

> [i]n addition to other equitable defenses, therefore, an employer may raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant.

Id.[13]

---

13. Petitioner pled a laches defense, which is indisputably established by the record facts, *i.e.*, respondent admitted that she did not complain even though she knew how and had the opportunity to do so, and petitioner was prejudiced in its defense as respondent's case was based on witnesses' improper characterizations of words uttered years earlier rather than precise accounts of the words uttered and the context in which they were spoken.

This case is precisely the silent employee scenario for which this Court enunciated the foregoing principles as necessary safeguards for employers. Such employers are deprived of the opportunity to address promptly any problem in their workplace as is the overreaching goal of the antidiscrimination laws, as well as a prerequisite for an action against the employer. Moreover, these principles especially must be applied in a speech-only hostile environment case because over time, the exact words used and the context of the speech, including who was present and the rest of the conversation, fade from memory. Thus, the employer is left to defend itself (as occurred in this case) against allegations of words taken out of context, snippets of conversation, and generalizations about the kinds of words spoken by various co-workers or about the environment in general.

The district court in fact highlighted the problem that has been recognized by this Court in *National Railroad Passenger Corp.*

> One person tells one dirty joke. One person perhaps insults the plaintiff, which is deplorable but, under the law, that is not in and of itself a hostile work environment.
>
> * * *
>
> Let's suppose a partner heard him kidding around, Are you getting any? Does that mean the partner knew that she was being discriminated against, that her working conditions were changed in a discriminatory manner?

> No. Because that kind of an incident doesn't even amount to discrimination that is required under the statute. And that is really a little of what I was getting at this morning. That is the problem with this case; ***the one person who had had it all put together, according to her testimony, is the plaintiff, and she never told them until she sues and it is too late for them to do anything about it.*** (emphasis added)

As this Court and the district court have recognized, the silent employee frustrates the remedial purpose of the antidiscrimination laws, which is to allow employers to remedy situations in their workplaces. Plainly, an employer cannot remedy situations about which it is unaware, including that a particular employee is offended by some particular words, and the silent employee should not be rewarded for her silence.

> At some point, employees must be required to accept responsibility for alerting their employers to the possibility of harassment. Without such a requirement, it is difficult to see how Title VII's deterrent purposes are to be served, or how employers can possibly avoid liability in Title VII cases. Put simply, an employer cannot combat harassment of which it is unaware.

Fierro v. Saks Fifth Avenue, 13 F. Supp.2d 481, 492 (S.D.N.Y. 1998).

The silent employee also thwarts the remedial framework provided to an employer under this Court's *Faragher* defense by which an employer may avoid liability if it establishes

that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). The employer never has an opportunity to undertake corrective measures since it is not advised of a problem.

Indeed, as the district court observed in this case:

> [y]ou have here not a lifeguard on a beach or a metal worker or a sanitation worker. You have a lawyer. . . . She had had a problem at [respondent's prior law firm]. She has testified that she knew all about complaining and she has given her reasons why she didn't complain. Now, the issue arises in my mind as to whether the lawyer who knows about complaints — she didn't need a policy to tell her about that. She knew about that, and she goes along for over a year and she does not in any way, shape or form complain or voice her displeasure to the people that she says are harassing her. She associates socially with those people, she treats them as friends, she asks favors of them. The week before she leaves she is taken for cocktails by the people that she is now claiming abused her. They pay a $140 bill for the cocktails that night. She never says a word.

* * *

> . . . I feel that there is a very serious issue about whether somebody who acted in that way has a right to file suit.

This Court should grant certiorari to further expound the "silent employee" principles it has articulated by applying those principles to the "silent employee" here, who has brought a speech-only hostile environment claim with no notice of any harassment to her employer until several months after leaving their employ and a year or more after the speech on which her claim is based was uttered.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the ruling of the court of appeals, which improperly reversed the district court's correct grant of judgment as a matter of law to the petitioner employer.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED FEBRUARY 27, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY JUDGMENT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of February, two thousand and two.

PRESENT: Pierre N. Neval
Guido Calabresi
***Circuit Judges*,**
Sidney H. Stein,
District Judge*

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* Honorable Sidney H. Stein, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

01-7256, 01-7322

ELLEN FITZGERALD,

Plaintiff-Appellant-Cross-Appellee,

v.

FORD MARRIN ESPOSITO WITMEYER & GLESER, L.L.P.,

Defendant-Appellee-Cross-Appellant.

APPEARING FOR APPELLANT: Debra L. Raskin, Vladeck, Waldman, Elias & Engelhard, P.C., New York, NY

APPEARING FOR APPELLEE: John J. Witmeyer III, Ford, Marrin, Esposito Witmeyer & Gleser, L.L.P., *pro se*, New York, NY

Appeal from the judgment of the United States District Court for the Southern District of New York (Thomas P. Griesa, *Chief Judge*).

Appendix A

IN CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and it hereby is **REVERSED.**

Plaintiff Ellen Fitzgerald appeals from the court's entry of judgment as a matter of law in favor of defendant, overturning a jury verdict in favor of the plaintiff. Plaintiff's action against her former employer alleged hostile environment and constructive discharge constituting unlawful sex discrimination in violation of Title VII of the Civil Rights act of 1964, 42 U.S.C. § 2000e *et seq.*, New York State Human Rights Law, Executive Law § 296 *et seq.*; and Administrative Code of the City of New York § 8-101 *et seq.* The jury found for Fitzgerald on the hostile environment claim and awarded $80,000 in compensatory damages. Following the verdict, the court granted defendant's motion for a judgment as a matter of law, concluding that the evidence viewed in the light most favorable to Fitzgerald, did not show a hostile environment "sufficiently severe or pervasive so as to alter the conditions of Fitzgerald's employment," as required by *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

In reviewing a district court's grant of a judgment as a matter of law under Rule 50(b), we apply the same standard as the district court. *Eagleston v. Guido*, 41 F.3d 865, 875 (2d Cir. 1994). Such a judgment is proper only if the evidence cannot reasonably support a verdict in favor of the non-moving party. *McCarthy v. New York City Technical College*, 202 F.3d 161, 165 (2d Cir. 2000); *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1346 (2d Cir. 1997).

Appendix A

In passing on such a motion, a court is obligated to assess the evidence in the light most favorable to the non-moving party. Although the court stated that it "assume[d] the correctness of Fitzgerald's version of the facts," the court on numerous instances construed significant evidence in a light more favorable to the defendant-employer. As examples, notwithstanding Fitzgerald's testimony that she was offended by her supervisor's conduct toward her and had a poor working relationship with him, coupled with the supervisor's own testimony that their relationship was "going to hostilities" and that he refused to work with her, the court found that Fitzgerald had a "comfortable working relationship" with the supervisor and that he was "highly supportive."

Where Fitzgerald testified to the effect that her socializing with various coworkers who harassed her represented her effort to make the best of her employment situation, the court construed this evidence as showing that her relationship with the coworkers was friendly.

As for Fitzgerald's evidence that her supervisor repeatedly called her "butch" and "dyke," the court treated these events as a joke of no significance for plaintiff's claim of sexual harassment on the ground that no one in fact "thought that Fitzgerald was a lesbian."

And where an associate sent Fitzgerald an email saying "you know who to come to and I can take care of you," the court dismissed this as "crude humor" without significance for the sex discrimination claim, because there was no indication he was in fact propositioning her.

As to these and other matters, the jury could have found that the defendant's conduct did not have the innocuous cast that the district court put on it, but rather represented successful efforts to belittle and humiliate Fitzgerald by reason of her gender.

The evidence furthermore included several instances in which lawyers, including partners, made remarks belittling female lawyers. It was suggested that one female lawyer had become a partner only by rendering sexual favors.

Viewing the evidence in the light most favorable to the plaintiff — as the jury was entitled to do — we have no doubt that the jury could reasonably find a gender biased pattern of discriminatory conduct constituting a hostile work environment in violation of Title VII.

Defendant makes a cavalcade of other arguments which, it asserts, justify a directed verdict in its favor, or, at a minimum, a new trial. We have considered all of these, and find them to be without merit. Accordingly, and because we find that the jury verdict in plaintiff's favor was properly supported by the evidence, we direct that the jury verdict be reinstated.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
CLERK OF COURT

s/ Oliva M. George
By: Oliva M. George, Deputy Clerk

APPENDIX B — AMENDED OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 27, 2001

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 96 CIV 7491 (TPG).

Ellen FITZGERALD,

Plaintiff,

v.

FORD MARRIN ESPOSITO WITMEYER & GLESER, L.L.P.,

Defendants.

Feb. 27, 2001

* * *

AMENDED OPINION

GRIESA, District Judge.

In this action plaintiff Fitzgerald sues for sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* At the trial before a jury, Fitzgerald asserted two claims of sex harassment against defendant Ford Marrin — (1) the creation of a hostile work environment, and (2) constructive discharge. The jury found for Fitzgerald on the first claim and against her on the second. The jury awarded $80,000 in compensatory damages on the first claim, but declined to award punitive damages.

Appendix B

Following the verdict, Ford Marrin moved for judgment as a matter of law setting aside the verdict on the first claim, or, in the alternative, for a new trial. At the oral argument the court denied the motion for a new trial, a ruling which the court now confirms. The court reserved decision on the motion for judgment as a matter of law. The latter motion is the subject of the present opinion.

For the reasons to be explained, the court grants Ford Marrin's motion to have the court enter judgment as a matter of law setting aside the verdict holding it liable for creation of a hostile work environment. The court notes that the jury's findings on this subject occurred in two phases. First, the jury found that there was a hostile work environment at Ford Marrin and that it was created by a partner alone or in conjunction with associates. Second, the jury found that Ford Marrin had not shown reasonable care to prevent and correct sexually harassing behavior and had not shown any neglect by Fitzgerald to take advantage of preventive or corrective avenues or to otherwise avoid harm. This second finding related to the issue of whether the firm could be liable for a hostile work environment created by certain persons at the firm. In ruling on the present motion the court is setting aside the first finding as to the existence of a hostile work environment. There is no need to deal with the second finding, because it assumed the first, which is now set aside.

The factual issues in this case were and still are hotly contested, with difficult questions of credibility. In fact, there have been two trials. The first resulted in a mistrial. It was only in the second that the jury was able to agree.

Appendix B

The court wishes to make it clear at the outset that the verdict of the jury is supported by sufficient evidence on the facts. What the court is referring to relates to the issues regarding whether persons at Ford Marrin engaged in the conduct alleged by Fitzgerald. The jury did not, of course, make detailed findings on Fitzgerald's specific contentions, but rather answered certain conclusory questions necessary to establish liability for hostile work environment. Nevertheless, for the sake of deciding the present motion it will be assumed that the jury resolved the essential factual issues in favor of Fitzgerald. On the evidence presented, the jury was justified in doing so.

What remains as an issue is whether Fitzgerald's version of the facts does or does not add up to a valid case of hostile work environment under the law. The discussion of the law will appear later in this opinion. However, there is a point which needs to be made at the outset. After reviewing the briefs on the present motion, the court requested each side to provide the decision or decisions most closely in point factually in relation to the present case, as well as factual summaries of as many additional cases as they wished to refer the court to. This turned out to be a most useful exercise. Neither side could refer the court to a case really in point on its facts. The parties brought the attention of the court to a host of decisions. But all of them, without any exception, dealt with conduct substantially different in its nature and severity from what Fitzgerald claims to have occurred in the present case. This means that this is a case of first impression.

Appendix B

Facts

The following statement is based on Fitzgerald's version of the facts, except to the extent that Ford Marrin's evidence is uncontradicted. In fairness it must be emphasized that Ford Marrin's witnesses fervently disputed Fitzgerald's factual contentions. The issues of credibility were unusually difficult. Fitzgerald is an attorney, and her two principal corroborating witnesses, Suzanne O'Neil (Suzanne Bernard when she was at Ford Marrin) and Katherine Scott, are attorneys, and they were all associates together at Ford Marrin. As far as one can tell they are professional persons of high character. At the same time, Ford Marrin is a successful law firm, in which the partners and associates are hard-working professionals of high character. On the essential issues, the testimony of the two sides was in direct conflict. The jury was instructed on the applicable preponderance of the evidence standard, and found for plaintiff.

Fitzgerald graduated from law school in 1990, worked for a New York law firm, then a Connecticut law firm for family reasons, and started at Ford Marrin in November 1993. At this time she was 29 years old. She remained at Ford Marrin until February 1995, when she resigned to go to another law firm.

During Fitzgerald's stay at Ford Marrin there were 9 partners, one of whom was a woman. There were 15 associates, three of whom (including Fitzgerald) were women. A fourth woman associate was added at some point, bringing the total number of associates to 16.

Appendix B

Hostile Work Environment

The sexual harassment alleged by Fitzgerald consisted of conduct which, for purposes of this opinion, will be considered in two categories. *First*, there were conversations and remarks about sex by male associates not directed at Fitzgerald, but which Fitzgerald overheard. She says that this kind of thing continued throughout her stay at Ford Marrin. Her allegations in this regard are directed mainly at associates James Adrian, David Beke and Michael Tricarico. *Second*, there were certain incidents of conduct directed at Fitzgerald. Under this second category, Fitzgerald makes her accusations against partner Michael Anania, and at the associate level, principally against James Adrian.

Although Fitzgerald does not accuse any partner except Anania of the offensive conduct, she does allege that other partners heard or observed at least some of such conduct.

The court will now elaborate to some extent on the evidence regarding the two categories, starting with the first.

a. *Associates' Talk*

Fitzgerald and her two supporting witnesses, O'Neil and Scott, and the accused male associates, were essentially contemporaries in age and in their time in the practice of law. Both these female and these male associates were well educated, generally well mannered and had remarkably likeable and attractive personalities. Moreover, except for a temporary coolness between Fitzgerald and one of the male associates, David Beke, they all existed at the firm on a most

friendly basis. For instance, one of the accused associates, Michael Tricarico, has testified without contradiction that Fitzgerald was his closest friend at the firm and that when they were both in the office they talked daily and frequently lunched together. O'Neil testified that the male associates were generally very nice and that she liked them.

Nevertheless, Fitzgerald accuses certain of the male associates of open talk about sex which was acutely offensive to her as a woman. Fitzgerald was exposed to this talk and heard it, but did not participate. Fitzgerald testified that the sexual talk which she heard and deemed offensive occurred two or three times a week during the entire time she was at the firm.

According to Fitzgerald's evidence, Adrian, Beke and Tricarico, occasionally joined by one or two other male associates, talked about "sex lives" and told jokes about sex and women. At least two of them were not married and there was talk about their sexual prowess and whether they were "getting any." They speculated about the sex lives of certain partners, including speculation about possible homosexual activity with associates on business trips. There was joking about masturbation in slang terms. Slang words for the male sex organ were part of the conversation. The word "fuck" was uttered — for instance, when a copy machine malfunctioned.

The conversations about sex and the sexual jokes would take place to some extent at lunch in the lunchroom. But O'Neil testified that the conversation became "quite vulgar" in the evening, when the associates had worked a

long day and after most of the staff had left; and that, as the office got emptier and emptier, and people felt freer and freer, "people's conversations loosened up as time went on." The sexual talk among the male associates at times took place in halls or in the offices of these associates and this was usually in the evening when there were not a lot of people around.

The sexual conversations were in a "humorous context," in O'Neil's words, and "nonsensical" as Scott put it. As indicated by O'Neil, they were a form of relaxation from intense work. Basically Fitzgerald's evidence about the male associates' talk is that they intended to have fun among themselves by talking and joking about sex.

The sexual conversations and remarks by the associates described thus far, falling into what the court refers to as the first category, were not about Fitzgerald. They did not contain comments about her or her person. Nevertheless, Fitzgerald's witnesses testified that occasionally the male associates showed a realization that they were embarrassing Fitzgerald.

As already stated, there were three male associates named by Fitzgerald and her two supporting witnesses as the principal sources of the sexual talk described above, joined in a few instances by one or two others. This total number of four or five was part of an associate population of 15 and later 16. Moreover, Fitzgerald has testified that at least two of the male associates, James Aiosa and Artemis Lekakis, were offended by the talk.

Appendix B

b. *Conduct Directed At Fitzgerald*

The second category of allegations relates to conduct directed at Fitzgerald. The incidents she relies on will now be summarized, except for what is too trivial to recount.

The associates at Ford Marrin worked in teams under the supervision of a partner. Fitzgerald was in the team headed by partner Michael Anania. Fitzgerald testified that on three occasions Anania referred to her by terms meaning lesbian. She testified that after the first occasion Adrian and some associates did the same for a short time. According to Fitzgerald —

> (1) In April or May of 1994 Fitzgerald was in Anania's office discussing a case. It appears that a person connected with the firm's client was a known lesbian. Anania referred to this person and stated, "She's a dyke, kind of like you, Ellen," laughing as he did so. Partner William Ford was present and said nothing.
>
> (2) After Anania had called her dyke and she "had shared that with Jim Adrian," Adrian referred to her half a dozen or so times as butch, including saying over the office intercom, "Butch, go to the kitchen." Another associate called her butch once. O'Neil testified that male associates used the terms butch or dyke to Fitzgerald in a teasing way, knowing that it made her uncomfortable, and that it was a way of joking around with her, although, on further questioning, O'Neil could specifically

recall only Adrian doing it. Scott testified that for a time the male associates referred to Fitzgerald as butch outside of her presence, and that this went on for a couple of weeks. Scott told one of the associates that Fitzgerald was bothered by this conduct, and it stopped.

(3) In June 1994 Anania observed Fitzgerald in a pants suit, and said that her attire was unprofessional. Fitzgerald disagreed and said, "You know it's completely professional." She was then leaving the office, and Anania said, "Well, when are you coming back, butch?" He laughed as he did so.

(4) On the third occasion, in September 1994, Fitzgerald led off the conversation by calling *herself* "butch" while that she planned to wear pants to an upcoming wedding. Anania responded by saying he had never called her that, but then did address her as butch and burst out laughing.

(5) In the course of this exchange, Adrian suggested that Fitzgerald wear something black and lacey.

Fitzgerald testified that the following incidents involving Adrian constituted part of the sexual harassment she experienced. According to Fitzgerald —

(1) Adrian had ordered Japanese finger food for dinner in the lunchroom and asked Fitzgerald, in

a sarcastic and demeaning tone, if she wanted to lick his fingers. O'Neil thought that Adrian was referring to the Kentucky Fried Chicken slogan — "Finger-Lickin' Good."

(2) Once when Fitzgerald and a paralegal were going out to dinner, Adrian said that they must be going out slumming to pick up men.

(3) On one occasion Adrian was changing clothes in his office and came out into the hall pulling up his pants so that Fitzgerald saw him in his boxer shorts.

(4) In the summer of 1994 Fitzgerald had a sweater on because of the air conditioning. She walked by Adrian's office and he said, "That isn't slutty enough." He then said, "Oh, I slipped." Fitzgerald testified that Adrian was laughing and to him it was "a joke," although she felt humiliated.

(5) Around Labor Day of 1994, when Fitzgerald returned from vacation at Martha's Vineyard, she received an e-mail from Adrian saying, "If Nantucket boy isn't getting it done, I can take care of you."

(6) Every other week or so Adrian would make a "cat call" or a "wolf whistle" at Fitzgerald, like the noise made by construction workers when an attractive woman walks near a construction site.

Appendix B

Fitzgerald testified that the following additional incidents involving Anania occurred.

> (1) At Fitzgerald's performance evaluation in December 1994 Anania said that Fitzgerald should be more aggressive and should be more like Adrian, remarking that if Adrian goes into a bar to pick up a woman and one turns him down he goes on to the next.
>
> (2) A partner by the name of Cushing O. Condon gave a Christmas party for associates in December 1994. After the party Anania asked Fitzgerald if there was any cock-twisting at the party, which Fitzgerald interpreted as referring to the male sex organ and as a play on Condon's initials — "COC." Not long afterwards in the lunchroom, and in the presence of managing partner Thomas P. Esposito, Anania asked Fitzgerald if she could "tell us about the cock-twisting at the party." Both Anania and Esposito were laughing.

At no time did any partner or associate at Ford Marrin make sexual advances to Fitzgerald or attempt to touch her in a sexual way or fondle her. There was no pursuit of her to establish a sexual or romantic relationship. No comments were addressed to her about her body or any part of her body.

c. *Effect on Fitzgerald*

Fitzgerald testified that the general talk and remarks of certain associates which she heard in the office, and the

remarks and conduct directed at her, caused her, beginning about March 1994, to have headaches and to lose sleep; and that she was also adversely affected at work in her morale and her ability to concentrate. Fitzgerald was sufficiently offended by the sexual conversation in the lunchroom that she greatly reduced her attendance there, as did O'Neil and Scott.

Other Interactions With Attorneys

In order to place the evidence described above in context, it is necessary to discuss other evidence regarding the interactions between Fitzgerald and the persons she ultimately accused in the lawsuit. This evidence is uncontradicted except on one point, which is noted.

Tricarico testified that Fitzgerald was his closest friend at the firm and that they regularly talked with each other on a variety of subjects, including personal matters. He would often have lunch with Fitzgerald either in or away from the office. Adrian and Fitzgerald were friends at the firm, and since Adrian had more experience at the firm than Fitzgerald, she often asked him about legal issues regarding cases she inherited from him and others. She also asked him for personal favors, which he performed. There was also a friendly relationship between Fitzgerald and Beke, until an incident which will be described and which had nothing to do with the sexual talk. All this went on during the time when Fitzgerald says that she was being subjected to the sexual harassment.

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On various occasions Fitzgerald would go to bars for drinks with attorneys at the firm, including Adrian, Beke and Tricarico. The bars which they patronized were St. Maggie's, North Star Pub, and Jeremy's, the latter being "very rough," with women's underwear hanging from the ceiling. On three occasions drinks were followed by Fitzgerald going with Beke and a few others for dinner, and once dinner was followed by a visit to a club on the East Side named "Live Psychic," where people climb up ladders and dance in a cage. Fitzgerald danced with Beke.

In July 1994, on Beke's birthday, Fitzgerald and others had drinks with him at St. Maggie's and then, after a plan for dinner with two other people fell through, Fitzgerald and Beke went to his apartment, where they kissed each other. Fitzgerald testified that shortly thereafter Beke intruded into the bathroom while she was there, after which Fitzgerald left Beke's apartment. Beke denied the bathroom incident and testified that after the kissing, which she initiated, he did not want to proceed further and took her to a cab. In any event, the two did not thereafter mingle socially until Fitzgerald was about to leave the firm. According to Fitzgerald this was because of her anger at Beke's behavior, but defense witnesses said that Fitzgerald manifested anger at Beke's unwillingness to date her. This is not an issue which the court assumes the jury resolved, and the court need not discuss it further. Plaintiff does not base any part of her claim of sexual harassment on the alleged bathroom incident.

In August 1994 Fitzgerald brought back from her vacation materials about a golf course and places to stay in Martha's Vineyard. She gave these to Anania, who was an

avid golfer. In September 1994 she and another associate in Anania's team took Anania to lunch to celebrate his 40th birthday.

During her last week at the firm, a group of her fellow associates gave Fitzgerald a going-away dinner. However, a few of the associates, including Adrian and Beke, could not attend the dinner, and the night before they took her for drinks at "Mad 61" on Madison Avenue. Fitzgerald said of her hosts, whom she would later accuse in the lawsuit, "They wanted to wish me well. . . . I thought it was a nice gesture." They picked up a bill for $140.

The next night a group, including Tricarico, took Fitzgerald for dinner. After dinner she walked uptown with Tricarico and another male associate, and the three had a drink at a bar on Central Park South, after which they went to Tricarico's apartment, where they played recordings of the "Jerky Boys," which had sexual content as bad or worse than the sexual talk alleged by Fitzgerald as occurring at the office. Fitzgerald joined in the laughter at these recordings.

The testimony of Fitzgerald and her supporting witnesses was that on the social occasions after work the offensive sexual talk by male associates did not take place.

Fitzgerald sought assistance in personal matters from the associates and they readily gave her such assistance. In April 1994 Adrian helped Fitzgerald with an issue about her income tax. Later, shortly after Labor Day 1994, Fitzgerald asked Adrian to help her break a lease and obtain the refund of a deposit. Adrian said that he would do this on his own time.

He worked out an accommodation for Fitzgerald with the landlord. When Fitzgerald was leaving the office she asked him to use a connection of his to obtain theater tickets for friends coming from New Haven. When the friends' plans changed, Adrian was asked to arrange a change of the tickets. He was not able to do this, although he tried.

In September 1994 Fitzgerald asked Tricarico to drive her to a wedding in New Jersey, which they were both attending. Tricarico replied that this would involve considerable extra driving, but agreed to assist her. On the return trip, Tricarico drove out of his way to her home in Brooklyn, arriving at about 1:00 a.m., the night before he was catching a morning plane for a business trip. When Fitzgerald moved to a new apartment on the upper East Side in late 1994, Tricarico, at her request, went with her to get the keys from the superintendent of the new building. Later, when Tricarico was renovating his new East Side apartment, he discussed the renovations with Fitzgerald and she visited his apartment so that he could show her the renovations and new furniture.

Shortly after Fitzgerald left the firm she gave Tricarico a housewarming gift for his new apartment with a note saying, "Welcome to the neighborhood. Love, Ellen."

Fitzgerald's Departure

Fitzgerald's legal work did not live up to the requirements of the demanding Ford Marrin firm. When the partners were reviewing her work in December 1994 the views were sharply negative. Her team leader Anania stated

that he would not work with her any longer. Ford, however, said in effect that he would take her under his wing because he wanted to try to have the firm succeed with Fitzgerald and vice versa. Fitzgerald was to be given a raise in salary, although not as much as the raise given to Adrian, who was viewed as more productive. Fitzgerald was told of her need to improve, of her transfer to Ford, and of the amount of her raise. Fitzgerald immediately communicated with another firm which had interviewed her at an earlier stage, and went with that firm in February 1995. In support of her claim for constructive discharge, Fitzgerald testified that the reason for her leaving had nothing to do with her negative performance review but only with the sexually charged work environment. The jury obviously disbelieved this assertion in denying her constructive discharge claim.

Failure to Complain

There was considerable evidence at the trial about whether Fitzgerald should have complained and whether Ford Marrin had circulated, or posted a policy regarding sexual harassment. This evidence largely related to the question of whether the Ford Marrin firm would be liable in the event that the jury found a hostile work environment. The jury's finding on the existence of a hostile work environment is being set aside on the present motion, making an analysis of the further questions regarding the firm's liability unnecessary on this motion. However, a brief summary of the evidence about Fitzgerald's failure to complain and about the issue of the sexual harassment policy will be presented.

Fitzgerald testified that beginning about March 1994, as a result of the hostile work environment, she was

experiencing headaches, loss of sleep, and problems at work with morale and ability to concentrate. By the fall of 1994 the environment made it hard to get her work done. However, when she was given a negative performance evaluation in December by Anania and Ford, and when Ford decided to have Fitzgerald work for him in the hope of resolving her problems, Fitzgerald said nothing to Anania or to Ford about her morale and concentration at the office suffering because of the abusive sexual talk, and it being hard for her to get her work done. She was, however, at about this time considering a lawsuit, which she discussed with O'Neil and Scott. Nevertheless she said nothing to Ford or any other partner about a problem which might give rise to a lawsuit. At no time during her tenure at Ford Marrin did she complain to a partner about anything relating to what she later sued about.

Fitzgerald explained that her failure to complain to a partner or partners resulted from the fact that certain partners had observed the misconduct and done nothing, thus indicating that a complaint by her would be useless.

Of course, the evidence showed that male associates were the principal perpetrators of the claimed harassment. If the sexual discussions and remarks of the associates could have been stopped or brought within bounds, the situation she complains about would have largely disappeared. Although there was testimony that at times Fitzgerald evidenced embarrassment, there was no evidence that the accused male associates had any idea that they were causing Fitzgerald the problems which she now claims resulted from their conduct. There was certainly no evidence that these male associates were aware that she regarded their conduct as sexual

harassment or as creating a hostile work environment. Fitzgerald testified that on one occasion, during the 15 months, during a sexual discussion between Beke and Tricarico, she said, "That's enough," or "Knock it off," and that they failed to do so. But Fitzgerald did not speak further about the issue or say anything to indicate any problems she was experiencing.

The Sexual Harassment Policy Issue

Ford Marrin introduced a document entitled "Sexual Harassment Policy," which Ford Marrin asserted was in effect during the time Fitzgerald was at the firm. It contained appropriate prohibitions which were as strict, or perhaps stricter, than what was legally required, and provided the names of partners to whom complaints could be made. Ford Marrin's witnesses testified that this policy was posted on an accessible bulletin board. Fitzgerald and O'Neil testified that they never saw such a policy on the bulletin board or elsewhere and knew nothing of it. Scott did not testify on the subject. For reasons which need not be described in detail, the evidence was not favorable to Ford Marrin on the issue of whether the policy was posted while Fitzgerald was at the firm. However, in view of the court's ruling on other issues, further discussion of the sexual harassment policy matter is not necessary.

The Trial

The trial of the action commenced on May 30, 2000 and concluded June 9, 2000. On the hostile work environment issue the jury was instructed in accordance with the legal

standards to be described later in this opinion. The first interrogatory to the jury asked if the jury found that there was a hostile work environment at Ford Marrin altering the terms or conditions of Fitzgerald's employment. The jury answered Yes. The jury was then asked if the hostile work environment was created by associates only or by "a partner alone or in conjunction with associates." The jury answered No to the first alternative and Yes as to the second. The jury was then asked if Ford Marrin had shown reasonable care to prevent and correct promptly any sexually harassing behavior and had shown that Fitzgerald unreasonably failed to take advantage of preventive or corrective opportunities provided by Ford Marrin or to otherwise avoid harm. This question was in accordance with the Supreme Court decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). The jury answered No. The jury awarded $80,000 in compensatory damages and declined to award punitive damages. The jury rejected Fitzgerald's claim that she was constructively discharged.

Discussion

On the present motion the court will deal solely with the finding of the jury that there was a hostile work environment at Ford Marrin — *i.e.*, the Yes answer to the first interrogatory. Since, for reasons to be described, the court determines that this finding should be set aside, the court will have no reason to go farther and deal with the further findings of the jury based on their finding of a hostile work environment.

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Before submission to a jury, a motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50 may be granted against a party on an issue if "there is no legally sufficient evidentiary basis for a reasonable jury to find for the party." Fed.R.Civ.P. 50(a). The same standard governs a renewed motion for judgment as a matter of law after a jury verdict. Fed.R.Civ.P. 50(b); *Raspente v. National R.R. Passenger Corp.*, 111 F.3d 239, 241 n. 3 (2d Cir. 1997). In determining a motion under Rule 50, the court must view the evidence in the light most favorable to the non-moving party, and give her the benefit of all reasonable inferences from the evidence that the jury might have drawn in her favor. *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 122 (2d Cir. 1996). If, after this is done, there is no "legally sufficient" basis for a finding in favor of the non-moving party on the issue in question, the motion must be granted.

In dealing with the present motion, the court assumes the correctness of Fitzgerald's version of the facts. The court undertakes to decide whether these facts are a basis, as a matter of law, for finding the existence of a hostile work environment.

The present case is brought under a provision in Title VII of the Civil Rights Act of 1964, which states: It shall be an unlawful employment practice for an employer —

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2(a).

The statute does not literally deal with sexual harassment. However, the courts have long held that sexual harassment is a form of sex discrimination. The courts recognize two categories of sexual harassment in the workplace as a basis for Title VII liability — *quid pro quo* harassment and harassment creating a "hostile work environment." The claim in this case is a hostile work environment claim.

Certain Supreme Court decisions have set forth the authoritative law in hostile work environment cases, and need to be examined carefully to determine whether there is a valid claim in the present case.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), the plaintiff alleged that her supervisor made repeated demands upon her for sexual favors, in response to which she had intercourse with him some 40 or 50 times. There was also evidence that the supervisor fondled her in front of other employees and that he raped her on several occasions. The defendant presented contrary evidence and contended that, in any event, there was no valid claim because there was no tangible loss of an economic character. The Supreme Court held that no such loss need be shown, finding that the congressional intent in Title VII was to strike at the entire spectrum of disparate treatment of men and women in employment. *Id.* at 64, 106

S.Ct. 2399. The Court went on to enunciate certain definitions, which have become basic rules in hostile environment cases. The Court stated that Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65, 106 S.Ct. 2399. Mere utterance of an epithet which engenders offensive feelings is not enough to create liability. In order for sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Id.* at 67, 106 S.Ct. 2399. The Court held that the plaintiff's claim in that case was legally sufficient.

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), the plaintiff was often insulted by the company president because of her gender and was made the direct target of unwanted sexual innuendos, all in the presence of other employees. In front of other employees, the president suggested that he and the plaintiff go to a hotel to negotiate the plaintiff's raise. The president occasionally asked the plaintiff and other female employees to get coins out of his front pants pocket, and he would throw objects on the ground in front of the plaintiff and other women, asking them to pick the objects up. He made sexual innuendos about the plaintiff's and other women's clothing. In the presence of other employees, the president asked the plaintiff if she had promised sex to a customer in order to arrange a deal. Following findings to this effect by a magistrate, the district court dismissed the case on the ground that there was no sufficient showing of psychological consequences. The court of appeals affirmed. The Supreme Court reversed and remanded. The Court reiterated the points made in *Meritor*,

stating that Title VII is violated when the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Id.* at 21, 114 S.Ct. 367. The Court made it clear that conduct that is "merely offensive" is not enough to violate Title VII. *Id.* at 21, 114 S.Ct. 367. However, the Court held that so long as the work environment "would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be" psychologically injurious. *Id.* at 22, 114 S.Ct. 367. The concept of "abuse" was emphasized by the Court in using the phrases "discriminatorily abusive work environment" and "work environment abusive to employees because of their . . . gender" to describe what sort of environment violates Title VII. *Id.* at 22, 114 S.Ct. 367. Finally, the Court stated that a determination of whether an environment is hostile or abusive can only be made "by looking at all the circumstances."

> These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id. at 23, 114 S.Ct. 367. The Court in *Harris* did not actually hold that the conduct violated Title VII, but remanded for the application of the proper standard.

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), dealt with the question of whether a sexual harassment claim under

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Title VII could be made by a male who was lodging accusations against other males. The Court held that it could. In this case a man employed on an oil platform claimed that his male co-workers forcibly subjected him to various kinds of physical actions of a humiliating and sex-related nature, and once threatened him with homosexual rape. The Court reiterated the teaching of prior Supreme Court decisions that Title VII liability requires a showing that the workplace "is permeated with discriminatory intimidation, ridicule and insult" and that this must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* at 78, 118 S.Ct. 998. The Court stressed that Title VII is not to be expanded "into a general civility code." *Id.* at 81, 118 S.Ct. 998. Workplace harassment is not "automatically discrimination because of sex merely because the words used have sexual content or connotations." *Id.* at 80, 118 S.Ct. 998. To recover under Title VII, the plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations," but actually constituted discrimination because of sex. *Id.* at 81, 118 S.Ct. 998. "[O]rdinary socializing in the workplace —such as male-on-male horseplay or intersexual flirtation" should not be mistaken for discriminatory conditions of employment. *Id.* at 81, 118 S.Ct. 998. The Court stated that "the objective severity of harassment" should be judged based upon a consideration of all the circumstances, and that there must be "careful consideration of the social context in which particular behavior occurs." *Id.* at 81, 118 S.Ct. 998. The Court used the phrase "severely or pervasively abusive" in discussing whether the working environment is such as to violate

Title VII. *Id.* at 81, 118 S.Ct. 998. The following comment, although dealing with "same sex" harassment, is of general interest.

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

Id. at 81-82, 118 S.Ct. 998. The Court cited a statement in Justice Ginsburg's concurring opinion in *Harris* that the critical issue is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." 510 U.S. at 25, 114 S.Ct. 367.

In *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), the plaintiff was a female lifeguard. Her male supervisors engaged in unwanted touching of the plaintiff and other female lifeguards in a sexually degrading manner, commented on their bodies, and talked about their desire to have sexual relations with them. The decision dealt mainly with the question of what circumstances would cause an employer to be liable under

Title VII for sexual harassment committed by a supervisory employee. However, the Court also provided further guidance on what constitutes sexual harassment and hostile work environment in violation of Title VII. According to the decision, the Supreme Court had already "made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment." *Id.* at 788, 118 S.Ct. 2275. Discourtesy or rudeness should not be confused with actionable harassment. *Id.* at 787, 118 S.Ct. 2275. The standards set by the Supreme Court "for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' " *Id.* at 788, 118 S.Ct. 2275. The standards, properly applied "will filter out complaints attacking 'the ordinary tribulations of the workplace, such as sporadic use of abusive language, gender-related jokes, and occasional teasing.' " *Id.* at 788, 118 S.Ct. 2275. The quotation is from B. Lindeman & D. Kadue, Sexual Harassment in Employment Law, 175 (1992).

In *Faragher* the Court cited two court of appeals opinions as illustrations of compliance with the proper standards. *Id.* at 788, 118 S.Ct. 2275. These two cases are *Carrero v. New York City Housing Auth.*, 890 F.2d 569 (2d Cir. 1989) and *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986). In *Carrero* the Second Circuit held that there was a valid claim of hostile work environment in a situation where a supervisor made repeated unwelcome sexual advances to the plaintiff, which were not only unasked for and unacceptable, but were coerced, since they were inflicted by the plaintiff's immediate superior. 890 F.2d at 578. In *Moylan* the Eighth Circuit upheld a sexual harassment claim where the evidence showed that the plaintiff's superior, a sheriff, repeatedly came

into the plaintiff's office and made sexual advances, including fondling and kissing her, and trapped her in an office in the courthouse where he raped her. 792 F.2d at 750.

Isolated instances of harassment will usually not suffice to establish a hostile work environment. Rather, the plaintiff must show either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of her employment. *Howley v. Town of Stratford*, 217 F.3d 141, 153 (2d Cir. 2000); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000).

In order to recover for sexual harassment a plaintiff must make out a case both objectively and subjectively — *i.e.*, must show that the working environment was one that a reasonable person would find abusive, and one that the victim subjectively perceived to be abusive. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Usually the first inquiry is whether the workplace is abusive under the objective standard, and it is this inquiry which the court is dealing with on the present motion. Unless the workplace is found to be objectively abusive there can be no recovery.

The most recent Second Circuit decision regarding sexual harassment and hostile work environment is *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000). This case is relied on by Fitzgerald, but the facts are sharply different from those in her case. The plaintiff was a firefighter and the only woman in the town's force of 100. She was a lieutenant. A controversy arose as to whether two persons should be admitted to the

benevolent association. The plaintiff opposed admission. Another lieutenant, Holdsworth, junior to the plaintiff, was in favor. At a meeting of the association, Holdsworth yelled out a series of obscene insults at the plaintiff, of a degree of filth beyond what the court is willing to quote in this opinion. After the meeting Holdsworth did not again confront the plaintiff with obscene epithets, but he attempted to diminish her authority by a variety of means. The district court granted summary judgment to defendants on the ground that the alleged harassment essentially involved only one incident. The court of appeals reversed. Referring to the meeting at which the obscene attack was made, the court stated:

> . . . considering all the circumstances, Holdsworth's conduct could reasonably be viewed as having intolerably altered Howley's work environment, for Holdsworth did not simply make a few offensive comments; nor did he air his views in private; nor were his comments merely obscene without an apparent connection to Howley's ability to perform her job. Although Holdsworth made his obscene comments only on one occasion, the evidence is that he did so at length, loudly, and in a large group in which Howley was the only female and many of the men were her subordinates. And his verbal assault included charges that Howley had gained her office of lieutenant only by performing fellatio.

Id. at 154. The court went on to state that Holdsworth's attack could have had the effect of diminishing the respect for the plaintiff among the firefighting force and impairing

her ability to lead. The court also noted that Holdsworth's campaign against the plaintiff continued after the meeting and that this could be viewed by a factfinder as gender related.

In *Cruz v. Coach Stores, Inc.*, 202 F.3d 560 (2d Cir. 2000), there was a claim of hostile work environment involving both race and sex. On the sexual aspect of the case, the plaintiff claimed that her supervisor made repeated remarks such as saying that women should be barefoot and pregnant, that the supervisor would stand very close to women employees when talking to them and would look them up and down, and that he would back the plaintiff against a wall while talking to her until she cut off the conversation in order to extricate herself. *Id.* at 571. In reversing the district court's grant of summary judgment to the defendant, the court of appeals stated that a reasonable jury could conclude that the supervisor physically harassed the plaintiff regularly throughout her employment in a manner that was hostile to her because of her sex. *Id.* at 572. The court went on to state that the "crucial inquiry focuses on the nature of the workplace environment as a whole." *Id.* at 570. The court concluded that the facts alleged by the plaintiff regarding the behavior of her supervisor "brings this case over the line separating merely offensive or boorish conduct from actionable sexual harassment." *Id.* at 571.

It is now necessary to apply these rules and definitions from the authoritative decisions to the facts of this case. In this connection, it must be recognized that the Supreme Court has made a great effort to articulate what does and what does not constitute a valid claim of sexual harassment based on hostile work environment. The Second Circuit has

closely followed the rules and definitions laid down by the Supreme Court. The court in the present case must do the same.

Was Fitzgerald's workplace at Ford Marrin permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive so as to alter the conditions of Fitzgerald's employment and create an abusive working environment? Using the equivalent phraseology employed in *Oncale,* was the conduct at Ford Marrin "severely hostile or abusive" toward Fitzgerald, creating a severely or pervasively abusive working environment? And were these things shown in light of all the surrounding circumstances?

As noted above, the Supreme Court has gone so far as to say that the conduct must be extreme in order to amount to a change in the terms and conditions of employment. The Court has said that the standard for judging hostility must be sufficiently demanding so as to prevent Title VII from becoming a general civility code. The Second Circuit has stated that there is a line between merely offensive or boorish conduct and actionable sexual harassment. Was the conduct at Ford Marrin extreme within the meaning of the Supreme Court? Was it such as to meet the demanding requirements of the Court for Title VII hostile work environment liability, or was it merely offensive or boorish?

In examining the facts of the present case, it is necessary, of course, to look at all the incidents and types of conduct in question *as a whole* and also to view the working environment as a whole. But this cannot be done in any intelligible manner without first examining separately particular incidents and particular types of conduct.

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The court starts with the sexual conversations and remarks by certain male associates among themselves (the court's first category). It was this conduct which, according to Fitzgerald's evidence, persisted throughout her entire time at Ford Marrin.

This conduct involved three associates, sometimes joined by one or two others, talking about sex, exchanging sexual jokes, and throwing off exclamations such as "fuck." All this occurred in the lunchroom and elsewhere under circumstances where Fitzgerald heard such talk two or three times a week. Fitzgerald's own witnesses asserted that the conversations were in a humorous vein; they were nonsensical. The conversations, including the jokes, were a way of relaxing. The exclamations were to some extent irritable, as when a machine malfunctioned. Fitzgerald's witnesses gave a full description of the nature of the talk and the language used, which is summarized earlier in this opinion. Without doubt, what these witnesses described was crude, boorish, and offensive to Fitzgerald, O'Neil and Scott. But the talk was not directed to Fitzgerald or her friends. Nor was it about any of them. It did not disparage them or contain anything insulting to them personally, nor was there any joking or bantering about anyone having sexual activity with Fitzgerald or her friends.

The court concludes that this joking and nonsensical sexual talk among certain male associates and the utterance of vulgar terms and epithets, while gross and offensive to a woman such as Fitzgerald, was not hostile or abusive, much less hostile or abusive to a severe or extreme degree. It did not impose upon Fitzgerald the severe or pervasive

discriminatory intimidation, ridicule and insult spoken of by the Supreme Court. Misconceived, vulgar fun is something different from hostility and abuse if the meaning of words is to be attended to.

These conclusions are reinforced by examining the full picture of how the accused associates treated Fitzgerald and of her relationship with them. Fitzgerald described Tricarico as a "work friend," and this characterization applied to the entire time she was at Ford Marrin, which means all the time he was participating in the sexual talk. Fitzgerald's friendship with Tricarico was in fact close and constant, in the office and often socially outside the office, having nothing to do with sex or romance, but involving companionship, the sharing of confidences and the occasional exchange of favors and gifts.

Fitzgerald's friendship with Adrian was also close. Fitzgerald regularly sought Adrian's advice on questions pertaining to her cases. She asked him for help on personal matters of importance to her, and Adrian readily expended time and effort in responding. Fitzgerald and Adrian participated together in normal office social occasions after work.

Beke and Fitzgerald were friends at the office and sometimes socially until the incident described earlier, which occurred about midway through Fitzgerald's employment at Ford Marrin and had nothing to do with her claim of offensive sexual talk. However, later, when Fitzgerald was leaving the office, Beke was one of her hosts at an expensive visit to a bar on Madison Avenue, to wish Fitzgerald well.

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Nothing would be added by analyzing Fitzgerald's relationship to the one or two other male associates who joined in the sexual talk, except to say that it was a normal and friendly one.

Given the entire picture of Fitzgerald's treatment by Tricarico, Adrian, and Beke and the one or two others, there is no basis for saying that these associates were severely hostile or abusive to her or that they inflicted upon her a severely or pervasively abusive working environment. A working environment with the kind of manifestations of mutual goodwill that occurred here is surely not what the Supreme Court is talking about as an abusive environment.

The court now turns to what the court has described as the "second category" — conduct directed to Fitzgerald. This discussion properly starts with what presents the most difficult issue in the case — the instances when, according to Fitzgerald's evidence, Anania, as well as Adrian and other male associates, referred to her as dyke and butch.

Fitzgerald ascribes three incidents to Anania: (1) a meeting in April or May 1994 in Anania's office, attended by Ford, at which Anania said that a woman connected with the client was a "dyke, kind of like you, Ellen"; (2) an incident in June 1994 when Anania objected to Fitzgerald's pants suit and referred to Fitzgerald as a butch; and (3) an incident in September 1994 when Fitzgerald referred to herself as a butch, after which there was some give and take in the presence of Adrian — Anania denying that he had ever called Fitzgerald a butch and then ending up addressing her as butch.

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The court is bound to say that it finds Fitzgerald's testimony on this subject questionable, particularly as to the meeting of April or May 1994. However, for purposes of the present motion the court will continue to assume that Fitzgerald's version of the facts is correct.

There is no way one can defend calling Fitzgerald a dyke or butch, assuming that this occurred. But the question remains as to whether the conduct of Anania and of Ford, assuming Ford permitted such conduct on the first occasion, was severely hostile or abusive and whether it created or contributed to an abusive work environment.

Fitzgerald is not a lesbian. There is no evidence suggesting that Anania or Ford or anyone else thought that Fitzgerald was a lesbian or was trying to give Fitzgerald the reputation of being a lesbian. However, Anania's dyke reference at the April/May meeting, if it was made, was one remark in a meeting which involved a review of a case Ford was taking over for Anania. There is no indication that the rest of the discussion was anything but professional and courteous. Also, the remark would never have gone outside Anania's office if Fitzgerald had not told others about it. She told not only O'Neil and Scott, but also Adrian, who was one of the three or so associates she considered to be engaging in offensive sexual talk in the office. As to the June remark, there is no indication that it was heard by anyone other than Fitzgerald.

But, according to the Supreme Court precepts, the issue of whether the conduct of Anania and Ford was abusive and created an abusive working environment can only be

answered by an examination of the overall relationship of Fitzgerald with Anania and Ford during this period. Fitzgerald herself testified at the trial about how, in June 1994, Anania gave her an assignment which was "very exciting" and was "something you want to sink your teeth into" and that "you look forward to." Anania asked her to prepare to examine three witnesses at a trial, which meant interviewing them and preparing a "Q and A" for each. Before interviewing one of the witnesses, who was a sheriff, Fitzgerald spoke to Ford. Fitzgerald's testimony in this regard conveyed the idea that she was receiving approbation from Anania and Ford, and had a comfortable working relationship with them. This testimony related to the period of time shortly after the April/May meeting and during the very month when the pants suit encounter occurred.

In August 1994 Fitzgerald brought back from her vacation certain information about golf at Martha's Vineyard, which she gave to Anania, and in September she and another associate in Anania's team took Anania to lunch to celebrate his 40th birthday.

Aside from the offensive reaction which Fitzgerald testified arose from Anania using the terms dyke and butch, there is no testimony from Fitzgerald and no other evidence that Anania's conduct caused Fitzgerald difficulty in working in his team. Such a thing is simply not addressed in her evidence. In addition, there is no evidence that Ford's observation of the dyke incident, if it occurred, altered in any way whatever working relationship Fitzgerald had with Ford. There is no evidence that the alleged pants suit incident

even had the effect of deterring Fitzgerald from wearing pants suits. The uncontradicted evidence is that women associates at Ford Marrin wore pants suits when they chose.

Looking at all the circumstances, the overall conduct of Anania and Ford at the time of the dyke incident and the pants suit incident was on balance neither hostile nor abusive and it did not create or contribute to an abusive working environment. In fact the uncontradicted evidence shows that the conduct of Anania and Ford, taken as a whole, was highly supportive of Fitzgerald at the time in question, creating what was in fact a beneficial working environment.

As to the occasions on which Adrian and possibly other associates referred to Fitzgerald as butch, the court notes several things. In the first place, the court does not discount in the slightest degree the offensiveness to Fitzgerald of such conduct. But according to Fitzgerald's own witness, O'Neil, the associates who were involved were teasing and joking around, although they were aware of Fitzgerald's discomfort. Moreover, Fitzgerald recalled being called butch no more than a half a dozen times or so, and Scott said that the problem lasted about two weeks. The conduct stopped after Scott relayed Fitzgerald's complaint.

The court believes that the kind of teasing and joking conduct in question here is what the Supreme Court has specifically excluded from being grounds for Title VII liability. Moreover, when all the circumstances are taken into account, the conduct of Adrian, joined by a few others, was not hostile or abusive toward Fitzgerald and did not, when the whole picture of the friendship between Adrian and

Fitzgerald is considered, inflict upon Fitzgerald an abusive working environment.

As to the September incident with Anania, there is nothing to suggest that anyone would have referred to Fitzgerald as butch at this time if she had not led off by doing so. In any event, as earlier described, the overall conduct of Anania toward Fitzgerald and the working environment between them was professional and satisfactory, as Fitzgerald herself has described it. She described the status of their working relationship in June and gave no indication of any deterioration by September.

Fitzgerald claims misconduct on Adrian's part because during the course of the September conversation he suggested that Fitzgerald wear something black and lacey to the wedding under discussion. This simply did not rise to the level of sexual harassment.

A few other claims of misconduct on the part of Adrian need to be dealt with.

The incident in early 1994 when Adrian asked Fitzgerald if she wished to lick his fingers, which was a reference to Kentucky Fried Chicken's slogan "finger lickin' good," was obviously a jest and was neither hostile nor abusive. There is no evidence of Adrian attempting to engage in sexual activity of any kind with Fitzgerald, or making any actual sexual advances toward her.

Adrian's comment that Fitzgerald and a paralegal must be going out slumming to pick up men was misplaced humor,

but cannot be considered to meet the Supreme Court's definition of severely hostile or abusive.

With regard to the boxer short incident, the court is mindful of the need to accept Fitzgerald's version of the facts, but it is difficult to avoid noting Adrian's perfectly plausible testimony about a subject he undoubtedly knows most about — that he does not wear boxer shorts and was changing into athletic shorts. In any event the incident did not involve any actual indecent exposure, and cannot be said to have been severely hostile or abusive.

Fitzgerald testified that in June 1994, when she was wearing a sweater because of the over-cool office, she passed Adrian's office and he said that what she was wearing was not slutty enough. The court readily concludes that this was not severely hostile or abusive conduct and that, in the context of Fitzgerald's overall favorable relationship with Adrian, the incident did not create or contribute to an abusive working environment.

As to the e-mail incident, this occurred after both Fitzgerald and Adrian returned from their vacations around Labor Day of 1994. Adrian testified, and Fitzgerald did not deny, that she had brought a couple of maps back with her and asked Adrian to come to her office and advise her where they should be placed; that they discussed her vacation, and that he had asked her whom she was with. Adrian testified that Fitzgerald responded that she was with a male friend and that there was then some jesting about sex of a quite innocent nature. Fitzgerald's testimony does not say how she responded about whom she was with. But she denied any

jesting about sex, something the court must accept. Adrian testified, and Fitzgerald did not deny, that the e-mail system among associates had not been working and that during his conversation with Fitzgerald, Scott came in and announced that they could now exchange e-mails, which they proceeded to do. Fitzgerald testified that Adrian sent Fitzgerald an e-mail saying, "If Nantucket boy isn't getting it done, I can take care of you." Adrian did not deny that something of this nature was sent, but said that it was a joking follow-up to the earlier conversation. This again is an example of, at most, crude humor. There is no indication that Adrian was propositioning Fitzgerald. He never did so. What Adrian did cannot be considered abusive. It should be noted that shortly after this incident Fitzgerald asked Adrian for his help in breaking a lease and obtaining the refund of a deposit, which Adrian readily agreed to do.

The "cat calls" or "wolf whistles" which are said to have been made by Adrian at Fitzgerald every other week or so would surely come under the heading of the kind of flirtation which the Supreme Court has specifically excluded from what it deems sexual harassment.

Finally, there are two remaining claims about Anania.

Fitzgerald testified that at her performance evaluation in December 1994 Anania said that she should be more aggressive and be more like Adrian, who, if turned down by one woman at a bar goes on to the next. This was merely a metaphor about aggressive legal performance and not intentionally sexually suggestive.

Appendix B

After the Christmas party of partner Cushing O. Condon in December 1994, Anania, according to Fitzgerald, asked Fitzgerald if there had been any cock-twisting at the party, and repeated the question later in the presence of Esposito. Apparently Condon, aside from having the initials "COC" was also an excellent dancer. Thus, there was the double entendre, one meaning having a sexual connotation. It falls clearly within the realm of the offensive and boorish, but not the severely hostile or abusive. In any event, by this time Fitzgerald was negotiating with another firm to move there from Ford Marrin despite the fact that Ford had decided to attempt to assist Fitzgerald in her performance difficulties by having her assigned to him.

The conclusions of the court set forth thus far in this opinion are based on Fitzgerald's version of the facts, supplemented in some instances by uncontradicted evidence from Ford Marrin, and are made as a matter of law, applying the definitions contained in the Supreme Court decisions.

Now that the various elements of Fitzgerald's claim have been analyzed individually, it is necessary to deal with the issue of whether, taken as a whole, these elements add up to a basis of liability under Title VII. Sometimes the whole is greater than the sum of the parts. There is an issue about whether that is true here.

The sexual talk among male associates (the court's "first category"), overheard by Fitzgerald, was offensive to her, and for good reason, as the factual description in this opinion makes abundantly clear. The remarks and actions directed to Fitzgerald (the "second category") were in some cases

innocuous, but in other cases deeply offensive, as in calling her dyke and butch.

But the underlying characteristic of the conversations, remarks and acts complained of, taken as a whole, is that they were in a humorous vein, joking, teasing, relaxation from the rigors of demanding legal work. Even the references to Fitzgerald as dyke and butch were something other than serious attempts to paint Fitzgerald as a lesbian. The same is surely true of her own remark that she was a butch. Even O'Neil testified that in this connection Adrian and other associates were teasing and joking, albeit in a way that made Fitzgerald most uncomfortable.

It should also be added that the instances of offensive talk and behavior took place in the context of an overall considerate, professional treatment of Fitzgerald, and relationships within the firm of the utmost friendliness. It is uncontradicted that, throughout her tenure at Ford Marrin, Anania and the other partners Fitzgerald worked for gave her assignments and directed, assisted and reviewed her work in an entirely proper and professional manner. All of this is highly relevant in judging whether there was severely hostile or abusive treatment of Fitzgerald and whether there was an abusive working environment. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81- 82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

When all the relevant circumstances are taken into account, there is no basis for finding that the accused persons at Ford Marrin treated Fitzgerald in a hostile or abusive manner, and certainly not in a way that could be termed

severely or extremely hostile or abusive. There is no basis for finding that Fitzgerald's workplace at Ford Marrin was permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. The overall picture of the working environment was in fact virtually the opposite of an abusive one. The court draws these conclusions as a matter of law based on Fitzgerald's version of the facts and certain uncontradicted defense evidence. Any other conclusions would require the court to ignore or rewrite the carefully articulated definitions given by the Supreme Court. Obviously this court will not do the former and has no power to do the latter.

Fitzgerald testified that she experienced headaches, loss of sleep, and diminished morale and ability to concentrate as a result of the sexual talk and actions. The court accepts this as true. However, there is no evidence that Fitzgerald mentioned these problems to anyone at the firm, at least not to someone in a management capacity. Thus the problems were entirely subjective and personal. As the court explained earlier, Fitzgerald must make out a case under both an objective and a subjective standard. The court has concluded that, under an objective standard, there was no hostile work environment. The evidence about what Fitzgerald experienced of a subjective and personal nature does not detract from the conclusion which the court has reached.

The court must also make an observation about how the partners viewed the quality of Fitzgerald's work. The court has noted Fitzgerald's testimony about Anania and Ford displaying a favorable view of her work in the summer of

1994. Indeed it is uncontradicted that the partners gave her ample opportunities to show the degree of her industry and talent, even though ultimately the judgment on the quality of her work was negative when her performance was reviewed in December 1994.

Before concluding this opinion, some further comments about the case law need to be made. As described earlier in this opinion, after the regular briefing on the present motion had been completed, the court requested the parties to submit summaries of additional cases they thought would be helpful to the court *on their facts*. Fitzgerald provided summaries of 52 cases and Ford Marrin 59. These cases, together with those referred to in the regular briefs, while only a part of the great body of case law on the subject at hand, surely supplied ample information about how the courts have approached the hostile work environment issue in sex discrimination cases.

Fitzgerald, of course, has directed the attention of the court to decisions upholding hostile work environment claims. However, Fitzgerald has cited no case factually similar to the present case.

In the cases cited by Fitzgerald the plaintiff was frequently called a "whore" or other names of the vilest kind meaning the same thing. In some cases it was suggested in vile terms that the plaintiff should perform oral sex with a supervisor or co-workers or customers. Some of the plaintiffs were subjected to graffiti, pictures or cartoons of the most extreme obscene nature, dealing with male and female bodily parts and perverted sexual acts of all kinds. Probing into the plaintiff's sex life was a feature in certain cases. Some of

the cases involved unwanted, and sometimes threatening, touching and handling of a sexual nature. There are cases in which rumors were spread about illicit sex by the plaintiff. In some cases slurs were directed to the plaintiff, not of a sexual nature in an erotic sense, but disparaging her capacity to do her job because of her sex. Different cases had different combinations of the types of conduct. In some of the cases the conduct was directed to the plaintiff and in others against the women employees including plaintiff. *See, e.g.*, *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560 (2d Cir. 2000); *Leopold v. Baccarat*, 174 F.3d 261 (2d Cir. 1999); *Danna v. New York Tel. Co.*, 752 F.Supp. 594 (S.D.N.Y. 1990); *Dyke v. McCleave*, 79 F.Supp.2d 98 (N.D.N.Y. 2000); *Alfano v. Costello*, 940 F.Supp. 459 (N.D.N.Y. 1996); *EEOC v. A. Sam & Sons Produce Co.*, 872 F.Supp. 29 (W.D.N.Y. 1994); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996 (10th Cir. 1996).

In one case cited by Fitzgerald, the district court denied a motion for summary judgment where the plaintiff claimed a hostile work environment on the basis of "dirty jokes." *Poff v. Oak Tree Mortgage Corp.*, 61 Fair Employ. Prac. Cas. (BNA) 1562 (E.D.La. 1993). However, the court did not purport to undertake a thorough analysis of the law. Moreover, the female plaintiff was forced under protest to listen to the jokes told by the company president, and in one joke the president substituted the names of the plaintiff and a male employee, thus ridiculing the plaintiff's breasts and apparently posing a mock sexual relationship between the plaintiff and the other employee.

Appendix B

Two cases cited by Fitzgerald are of a different nature from what has been discussed above. In *Gallagher v. Delaney*, 139 F.3d 338 (2d Cir. 1998), the Second Circuit reversed a grant of summary judgment in a case where the plaintiff alleged that her supervisor was imposing his attentions upon her by directing her to accompany him on certain social occasions, by asking her personal questions and by telling her that she brought out adolescent feelings in him, all in the course of reminding the plaintiff that he was her boss and that she should keep him happy. The plaintiff claimed that his behavior implicitly constituted a request for sexual relations. The court held that there was a sufficient basis for having a jury decide the dual claim in the case of *quid pro quo* harassment and hostile work environment harassment. In *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), the Ninth Circuit reversed a grant of summary judgment on the ground that a co-worker's communications to the plaintiff, suggesting a relationship that did not exist, could cause the plaintiff to be concerned for her safety.

To summarize, the cases cited by Fitzgerald involving sexual talk, or other talk disparaging of women, were cases where the conduct was literally hostile and abusive to a severe degree. *Gallagher* and *Ellison* dealt with attempts to develop unwanted sexual relationships. None of Fitzgerald's cases offers a precedent for finding liability in the present case.

Ford Marrin has cited cases in which hostile environment claims have been denied as a matter of law. Certain of these are of interest because they are examples of courts responding to the warning of the Supreme Court that Title VII should not be used as a civility code. *Black v. Zaring Homes, Inc.*,

104 F.3d 822 (6th Cir. 1997); *Baskerville v. Culligan International Co.*, 50 F.3d 428 (7th Cir. 1995); *Shepherd v. Comptroller of Public Accounts of State of Texas*, 168 F.3d 871 (5th Cir. 1999). However, on their facts, these cases deal only with claims that are analogous to what this court has described as falling in the "second category." None of the cases cited by Ford Marrin deal with a situation where there was a running exchange of conversation among co-workers about sex, a relating of sexual jokes, and the use of certain vulgar terms, none of which was directed at the plaintiff but was overheard by her. This is what the court in the present case has described under the heading of the "first category." It is this latter feature of the case at hand which finds no real analogue in any decision to which the court's attention has been called. Indeed, this court knows of no decision where the facts of the present case, taken as a whole, have been the subject of a judicial ruling under Title VII. However, for the reasons explained earlier, the court concludes that the definitions articulated by the Supreme Court preclude liability in the present case.

Conclusion

The court grants Ford Marrin's motion for judgment as a matter of law setting aside the jury verdict finding a hostile work environment. This means that the action is dismissed.

Settle judgment.

SO ORDERED.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 23, 1999

UNITED STATES DISTRICT COURT,
S.D. NEW YORK

No. 96 Civ. 7491(TPG).

Feb. 23, 1999

Ellen FITZGERALD,

Plaintiff,

v.

FORD MARRIN ESPOSITO WITMEYER & GLESER, L.L.P.,

Defendant.

* * *

OPINION

GRIESA, Chief Judge.

Plaintiff Ellen Fitzgerald brings this action against defendant Ford Marrin Esposito Witmeyer & Gleser, L.L.P. alleging sex discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a ("Title VII"); the New York State Executive Law

§ 296 *et seq.* (the "State Law"); and the Administrative Code of the City of New York § 8-107 *et seq.* (the "City Law"). Defendant moves for summary judgment on the grounds that (1) plaintiff's Title VII claim is time barred; (2) plaintiff cannot make out a prima facie case; and (3) plaintiff failed to avail herself of internal procedures to address sex harassment claims. Plaintiff opposes defendant's motion.

Defendant also moves to strike the declaration of Suzanne O'Neil for failure to comply with Fed.R.Civ.P. 56(e) and to strike portions of the affidavit of Ellen Fitzgerald as a sham affidavit.

Defendant further moves to amend its answer to clear up any ambiguity as to whether the affirmative defense of untimeliness of plaintiff's Equal Employment Opportunity Commission ("EEOC") charge was sufficiently raised.

Defendant's motions to strike are denied. Defendant's motion to amend the answer is granted. Defendant's motion for summary judgment is denied.

Plaintiff's Claim

Plaintiff, who graduated from law school in May 1990, was an associate at Ford Marrin from November 23, 1993 to February 2, 1995. On January 23, 1995 plaintiff gave notice of her resignation, and worked her last day on February 2, 1995.

Plaintiff had been a litigation associate at two different law firms before beginning at Ford Marrin. After leaving Ford

Marrin, plaintiff worked for the law firm of Healy & Baillie, until July 1998, when she became an Assistant Attorney General in the Litigation Bureau of the office of the New York State Attorney General.

During plaintiff's employment, Ford Marrin had nine partners, including one female partner, and 13 to 16 associates.

Plaintiff filed a charge with the EEOC on September 11, 1995 alleging sex discrimination. The charge form contains a box, directly above the box within which appears plaintiff's signature, which contains the following language: "I want this charge filed with both the EEOC and the State or local agency, if any."

The EEOC and the New York State Division of Human Rights had entered into a "Worksharing Agreement" for the fiscal year beginning October 1, 1994 and ending September 30, 1995. Under the Worksharing Agreement, the DHR authorized the EEOC to accept charges on its behalf, but required that dual- filed charges initially received by the EEOC were to be forwarded to the DHR within two days of receipt by the EEOC. Agreement §§ II(A, E). The Agreement further provided that:

> [f]or charges originally received by the EEOC and/or to be initially processed by the EEOC, the [DHR] waives its rights of exclusive jurisdiction to initially process such charges for a period of 60 days for the purpose of allowing the EEOC to proceed immediately with the processing of such charges before the 61st day.

Appendix C

Agreement § III(A)(1). The exclusive jurisdiction here referred to will be discussed later in this opinion.

Neither party has provided the court with any information on what proceedings, if any, were conducted by the EEOC or the DHR. On September 9, 1996 plaintiff was issued by the EEOC a right to sue letter. On October 2, 1996 plaintiff instituted this action.

Plaintiff alleges that the atmosphere created by certain associates and partners at Ford Marrin constituted a hostile work environment. Plaintiff alleges numerous incidents of harassing conduct by these individuals for which she provides dates from December 1993 through December 1994, as well as certain instances of conduct or patterns of conduct for which no date is specified.

Discussion

Summary Judgment Standard

Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party has the burden of identifying the evidence that it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A dispute regarding

a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. All ambiguities must be resolved and all reasonable inferences must be drawn in favor of the nonmoving party. *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997); *Cifarelli v. Village of Babylon*, 93 F.3d 47, 51 (2d Cir. 1996).

Timeliness of Federal Claim

Plaintiff claims that defendant is barred from raising the affirmative defense of limitations to the federal claim because it was not properly pleaded.[1] The court does not find any such bar to asserting the defense, which appears to be sufficiently pleaded in the answer. In any event, defendant moves to amend the answer to clear up any doubt and the court grants that motion. *See* Fed.R.Civ.P. 15(a); *State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 855 (2d Cir. 1981).

Filing Period

The proper and timely filing of a charge with the EEOC is a pre-condition of instituting of a Title VII action.

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1. The statute of limitations for an action brought under the NYHRL is three years from the date of the alleged discrimination. N.Y.Civ.Prac.L. & R. 214(2). Moreover, the three year period is tolled during the pendency of a DHR charge. *See Brennan v. City of White Plains, et. al.*, 1998 WL 75692, at * 4 (S.D.N.Y. Feb.20, 1998). Plaintiff filed her complaint on October 2, 1996, less than three years after she began her tenure at Ford Marin on November 23, 1993. As such, there is no limitations issue with respect to the State Law claim.

Appendix C

42 U.S.C. § 2000e-5(e) provides that an EEOC charge generally must be filed within 180 days after the alleged unlawful employment practice occurred. Where, however, a charge is first lodged with a "State or local agency with authority to grant or seek relief," an EEOC charge must be filed within 300 days after the unlawful practice occurred or within 30 days after receiving notice that the State or local agency has terminated proceedings, whichever is earlier. *Id.* As previously noted, the Worksharing Agreement provided that dual-filed charges initially received by the EEOC were to be forwarded to the DHR. Although neither party has provided information on whether plaintiff's charge initially received by the EEOC was actually forwarded to the DHR, the court will assume for purposes of this motion that it was.

Several district courts in this Circuit have ruled that a charge first received by the EEOC and then forwarded to a state agency under the terms of a worksharing agreement is subject to the 300-day filing period. *McGuirk v. Eastern Gen. Ins. Agency*, 997 F.Supp. 395, 396-98 (W.D.N.Y. 1998); *Brennan v. City of White Plains*, 1998 WL 75692, at *4 (S.D.N.Y. Feb. 20, 1998); *Rivera v. City of New York*, 1997 WL 539776, at *4 n. 2 (S.D.N.Y. Aug. 28, 1997); *Rosenblatt v. Bivona & Cohen, P.C.*, 946 F.Supp. 298, 301 n. 3 (S.D.N.Y. 1996). The court finds the reasoning of these cases persuasive and holds that plaintiff's charge filed with the EEOC, which presumably was forwarded to the state agency pursuant to the Worksharing Agreement, is properly considered "initially instituted" in the state agency for purposes of invoking the 300-day limitation period.

Appendix C

Having determined that the applicable filing period in this case is 300 days, there is still the question of whether the initial filing, followed, as assumed, by reference to the state agency, was a filing with the EEOC for limitations purposes. Under Title VII, in a state having its own antidiscrimination agency, a claim cannot be filed with the EEOC for 60 days after the date proceedings begin with the state agency, "unless such proceedings have been earlier terminated." 42 U.S.C. § 2000e-5(c). As a result of the combination of the two relevant statutory provisions, if the 60-day waiting period is in effect, then the 300-day period includes 240 days before the charge is initially received and 60 days of waiting after the charge is received. Defendant claims that while plaintiff's charge was received by the EEOC on September 11, 1995, it cannot be considered filed until November 10, 1995 (60 days later). Defendant makes this claim without providing any information as to when the EEOC actually began processing plaintiff's charge or began its investigation. Nonetheless, applying the 300- day period to the November 10 date, defendant contends that plaintiff's charge is untimely as to all events preceding January 14, 1995.

However, the court must consider the effect of Section III(A)(1) of the Worksharing Agreement which, as noted earlier, waives the DHR's rights of exclusive jurisdiction to initially process charges such as plaintiff's for a period of 60 days "for the purpose of allowing the EEOC to proceed immediately with the processing of such charges before the 61st day." Agreement § III(A)(1). While it is clear that this provision is intended to waive the 60-day deferment period, the question is whether the waiver does away with the

60-day period for purposes of applying the EEOC filing requirement in Title VII. Title VII expressly provides for only one method of avoiding the 60-day deferral period. That method is termination of proceedings by the state agency prior to the expiration of the 60-day period. 42 U.S.C. § 2000e-5(c). Nowhere does the statute mention the option of waiver by the state agency. Nonetheless, courts have given effect to the waiver provisions of worksharing agreements.

In *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 114-115, 108 S.Ct. 1666, 100 L.Ed.2d 96 (1988), the Supreme Court held that the term "terminated," as used in § 2000e-5(c), does not necessarily mean completed. The Court held that where the state agency notified the EEOC that it "waived its right under Title VII to initially [and exclusively] process the charge" during the initial 60-day period, the state agency proceedings were considered "terminated," despite the state agency's retention of jurisdiction to act on the charge "after the conclusion of the EEOC proceedings." *Id.* at 113, 108 S.Ct. 1666. The Court concluded that "a state agency 'terminates' its proceedings when it declares that it will not proceed, if it does so at all, for a specified interval of time." *Id.* at 115, 108 S.Ct. 1666.

The EEOC regulations are in accordance with the above ruling and provide that the 60-day deferral period can be avoided if either the state agency proceedings are terminated or the state agency waives its right during the 60- day period to exclusively process the charge. 29 C.F.R. § 1601.13(b)(1).

The Second Circuit in *Ford v. Bernard Fineson Development Ctr.*, 81 F.3d 304 (2d Cir. 1996), has accepted

the EEOC regulations as a valid interpretation of Title VII. *Id.* at 309. Moreover, the *Ford* court held that "a Worksharing Agreement may contain a self-executing waiver of a state agency's right to exclusively handle discrimination claims for 60 days, and that this waiver may constitute 'termination' of the state agency's proceedings under § 2000e-5(c)." *Id.* at 311. *See also McGuirk*, 997 F.Supp. at 397; *Rosenblatt*, 946 F.Supp. at 301.

In accordance with these authorities, the court holds that at the time plaintiff submitted her charge to the EEOC, the waiver provision of the Worksharing Agreement was triggered and that it had the effect of "terminating" the DHR's proceedings for purposes of § 2000e-5(c). This meant that the charge was deemed "filed" with the EEOC at that time for limitation purposes. Accordingly, plaintiff's EEOC charge, filed on September 11, 1995, was timely as to all claims arising on or after November 15, 1994.

Continuing Violation

Plaintiff seeks to include as timely alleged wrongful acts occurring even before the November 15, 1994 cut-off date on the theory that there was a continuing violation. Plaintiff claims that to include as timely acts preceding November 15, 1994, she must show that "a discriminatory act" occurred after November 15, 1994 which was part of a pattern of conduct constituting a continuing violation, and that she has alleged several such incidents. The claim of continuing violation raises triable issues of fact, which cannot be disposed of by way of summary judgement.

Appendix C

The Merits

On the issue of whether conduct attributable to Ford Marrin occurring during the course of plaintiff's employment constituted a hostile working environment, the court finds that there are triable issues of fact. On the issue of whether plaintiff was constructively discharged by Ford Marrin, the court also finds that there are triable issues of fact.

Conclusion

Defendant's motion to amend its answer is granted. Defendant's motion to strike the declaration of Suzanne O'Neil and portions of the affidavit of Ellen Fitzgerald is denied. Defendant's motion for summary judgment is denied.

SO ORDERED.

* * * *

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED APRIL 29, 2002 DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of April two thousand two.

Fitzgerald,

Plaintiff-Appellant-Cross-Appellee

v.

Ford Marrin Esposito

Defendant-Appellee-Cross-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellee-Cross-Appellant Ford Marrin.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

Appendix D

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: s/ Arthur Heller
Arthur M. Heller,
Administrative Attorney